United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

75-7113

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

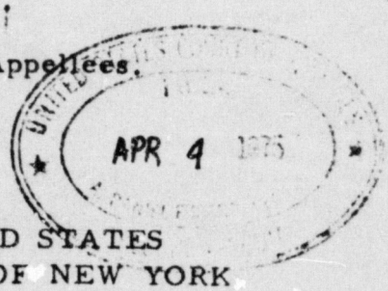
JAMES MARTIN, ANGELO LEONARDI, CARMINE LAVIA, RONALD DARIENZO, BRUCE DOAK and CARMINE APUZZO,

Plaintiffs-Appellants,

-against-

MARIO MEROLA, District Attorney, Bronx County, and individually, A.D.A. DWIGHT DARCY and A.D.A. STANLEY CHESLER,

Defendants-Appellees.



ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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JAMES MARTIN, ANGELO LEONARDI,
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Plaintiffs-Appellants,

-against-

Docket No.
75-7113

MARIO MEROLA, District Attorney,
Bronx County, and individually,
A.D.A. DWIGHT DARCY and A.D.A.
STANLEY CHESLER
Defendants-Appellees.

APPELLANTS' BRIEF

PRELIMINARY STATEMENT

This is an appeal from the grant of summary judgement in favor of the appellees, defendants below, in an action brought to redress deprivations of civil rights guaranteed by the United States Constitution.

The Appellants, plaintiffs below, are presently defendants in various New York State criminal actions. The Appellees, Merola, Darcy and Chesler, are respectively, the District Attorney of Bronx County and two of his assistants.

The acts committed by appellees which form the basis for the complaint all arose out of the arrest and detention of the appellants, and a press conference called by appellees to publicize the indictment and arrest of the appellants.

QUESTION PRESENTED

ARE THE APPELLEES, A DISTRICT ATTORNEY AND TWO ASSISTANTS, CIVILLY LIABLE INDER 42 U.S.C. 1983 FOR ABUSIVE TREATMENT OF APPELLANTS DURING AND FOLLOWING APPELLANTS' ARREST AND FOR DISSEMINATING PREJUDICIAL PUBLICITY CONCERNING APPELLANTS PRIOR TO THEIR TRIALS.

STATEMENT OF FACTS

The appellants are defendants in several indictments which were returned by a Grand Jury in Bronx County on August 2, 1974. Pursuant to these indictments, warrants of arrest were obtained and executed on August 7, 1974.

The appellants had, through their attorneys, exhibited their desire and intention to surrender. This desire to proceed with the legal process in an orderly manner was ignored by the appellees who ordered the arrest and detention of the appellants as is described hereafter.

Carmine Apuzzo, now deceased, was suffering from exaggerated diabetes and terminal cancer at the time of his arrest. At 10:30 A.M. on August 7, 1974 while Carmine was enroute to his doctor's office to receive radiation treatment and an insulin injection, he was stopped and arrested by detectives assigned to the office of the Bronx District Attorney. The appellees and the police officers (defendants below but not appellees here) were aware of Mr. Apuzzo's medical condition. Nevertheless, they prohibited him from going to his doctor to receive his needed treatment. Instead, Carmine was taken to the Bronx

District Attorney's office where he was harrassed and detained, without purpose or justification for more than three hours. During this time Carmine made repeated requests of the appellees to call his doctor so that he could obtain his insulin injection and radiation treatment. These requests were ignored.

At 7:00 P.M. Carmine was taken to the detention facility at 161 Street and Washington Avenue, where he was detained in the bull pen. Carmine spent the entire night, from arrest until arraignment the following morning without food or drink, without any medical assistance whatsoever, and without the most basic of sleeping provisions.

At 9:30 A.M., August 8, 1974, Carmine was taken before a judge for the purpose of being arraigned. He remained in Court for approximately 5 hours, during which time he frantically requested his tumor medicine and insulin injection. The judge said that before any medical treatment could be administered, Carmine would have to produce written medical proof of his condition. Of course, it was impossible for Mr. Apuzzo to fulfill this request as he was detained without opportunity to contact his doctor. Moreover, the appellees were actually aware of Carmine's condition but did not offer to the judge the slightest information with respect thereto.

Carmine was finally released on bail the following morning. During this period of approximately 48 hours, Carmine Apuzzo, suffering from diabetes and terminal cancer, was denied medical treatment and food and forced to sleep on a cold dirty stone floor with no pillow or blanket.

On October 28, 1973, Angelo Leonardi had massive open heart surgery. One year prior thereto, Plaintiff Leonardi suffered a major debilitating stroke. With knowledge of Mr. Leonardi's imminent indictment and his fragile medical condition, Attorney HENRY B. ROTHBLATT, contacted the appellees and the other defendants below to arrange for Mr. Leonardi's surrender. The appellees disregarded Mr. Rothblatt's request and arrested Angelo Leonardi on August 7, 1974.

Angelo was not allowed to go to his regular hospital or be treated by his own physician, the only doctor familiar with Mr. Leonardi's condition and required treatment. Yet Angelo was so obviously ill that appellee's agents, the detectives, did take him to Jacobi Hospital.

Subsequently, Angelo was taken to jail where he was held for 18 hours, like Carmine Apuzzo, without food or sleeping provisions. During this period appellees did not allow Angelo to see a physician and

they confiscated the medicine appellant required for his heart condition.

On the 2nd, 8th and 9th days of August 1974, the appellees issued press releases and statements to the various news media, Radio, Television, Newspapers, including the New York Times, New York Post, New York Daily News, and the Times Herald Record to the effect that the appellants were "linked directly to the Tramunti and Columbo Crime Families"....."linked to Mafi Crime Families," "Vultures" "tied ....strongly, ...with Tramunti crime family."

Additionally, the appellees and their agents while executing search warrants did, without probable cause and in direct contradiction to the mandates of the warrant, act in an unconstitutional and oppressive manner in that the appellees failed to limit the scope, nature and purpose of their search and did in fact, intrude and invade upon the appellants constitutionally protected zones of privacy.

POINT I

THE APPELLEES, A DISTRICT ATTORNEY AND TWO ASSISTANTS, ARE CIVILLY LIABLE UNDER 42 U.S.C. 1983 FOR ABUSIVE TREATMENT OF APPELLANTS DURING AND FOLLOWING APPELLANTS' ARREST AND FOR DISSEMINATING PREJUDICIAL PUBLICITY CONCERNING APPELLANTS PRIOR TO THEIR TRIALS.

This appeal presents the Court with the question of whether there is to be any limitation on the actions of prosecutors and whether a claim based on actions transcending proper state prosecutorial perogatives is cognizable in federal court.

In this civil action the appellants sought redress for acts, committed by appellees, which shock the conscience. Following their arrest various appellants were abusively treated and denied medical care. All of the appellants were victimized by a "press conference" held by the appellees at which appellees released information to the news media regarding the alleged "underworld" connections of the appellants. Even the District Court characterized the resulting news stories as lurid and sensational. Similarly, the District Court conceded that the conduct of the appellants may have violated both the American Bar Association Standards Relating to the Administration of Criminal Justice (Fair Trial and Free Press, Part II, § 2.1(c)(1)) and the Code of Professional Responsibility recognized by the New York State Bar Association.

The District Court noted that such "prejudicial pre-trial utterances" as were made here ought well justify such remedies as a delay of trial or a change

of venue, but it refused to recognize a civil cause of action to redress those grievances.

Although the exact basis for the dismissal is not clear, it appears that the court based its decision on the public's right to know and "some right of free speech" belonging to the prosecutor to allow him to "account through the media to the voting public for his stewardship of his important public trust."

As to the appellants allegations regarding the nature of their arrest and detention and the deprivation of essential medical care, the lower court found them frivolous or not properly interposed against the appellees. (see decision, p 4, Appendix

Despite finding that appellees conduct was arguably a failure to comply with the ABA Standards and that the conduct may have constituted a breach of the Code of Professional Responsibility adopted by the New York State Bar Association (Judiciary Law, McKinney's Supp. 1974). Nevertheless the court determined that such breaches of prosecutorial responsibility do not amount to deprivations of "'rights, privileges, or immunities secured by the Constitution and laws' 42 U.S.C. § 1983", decision of Hon. Charles L. Brieant, U.S.D.J. (Appendix, A-15)

There is no more important right than the right of every criminal defendant to a fair trial. Nor is there any right more jealously guarded by the judiciary. The Supreme Court has held, in the strongest terms, that pre-trial publicity is not consonant with a fair trial and excessive pre-trial publicity proclaiming a defendant's guilt is a denial of due process of law. Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed 2d 600.

Not only did the Supreme Court recognize that the dissemination of prejudicial publicity threatened the right of a criminal defendant to due process of law, the Court continued:

> ...the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. 384 U.S. at 362, 16 L.Ed. 2d at 620.

The decision of the lower court regretably sanctions violations of essential constitutional rights. It ignores the direction of the Supreme Court that

courts must fashion means and methods to protect their processes from the prejudice emanating from pre-trial publicity.

While it is true, as the District Court suggests, that as criminal defendant, the appellants have potential remedies which may lessen the effect of appellees activities, those remedies are difficult to secure and not entirely successful. For example, were appellants criminal cases moved to another venue they would probably become a local "cause celebre", merely because such changes of venue are unusual and generally considered newsworthy.

Any action by the District Court is not barred by any doctrine of immunity properly available to the appellees.

Various federal courts, including the Supreme Court of the United States have developed and recognized a limited immunity from suit for prosecutors. See Barr v. Mateo, 360 U.S. 564, 3 L.Ed. 2d 1434, 79 S.Ct. (1959); Gregoire v. Biddle, 177 F.2d 579, (2nd C.A. 1949); Bauer v. Heisel, 361 F.2d 581, (3rd C.A., 1966); Palermo v. Rockefeller, 323 F.Supp. 478 (S.D.N.Y., 1971). Nevertheless, this immunity is not an unlimited carte blanche granted prosecutors merely by virtue of their official position.

In Barr v. Mateo, supra, the Supreme Court noted that a government official must be able to act within his authority without fear that the motives that control his actions may be called into question. 360 U.S. at 570, 3 L.Ed.2d at 1440, 1441.

Public policy requires that prosecutors not be liable to suit even for malicious actions undertaken within the scope of their authority. This unpalet - able situation is mandated because of the inability of the judicial system to separate, prior to a trial of the merits, the well-founded suit from the merit-less one. Gregoire v. Biddle, supra at 581 cited in Barr v. Mateo, 360 U.S. at 571, 3 L.Ed.2d at 1441.

The Supreme Court in Barr v. Mateo succinctly summed up the underlying reason for granting immunity to prosecutor for acts done within their authority: "It has been thought important that officials of govern-ment should be free to exercise their duties unembar-rassed by the fear of damage suits in respect of acts done in the course of their duties..." 360 U.S. at 571, 3 L.Ed.2d at 1441.

It is apparent that the immunity envisioned by the Court is not total immunity but limited immunity extending only so far as do the official duties of the prosecutor whose acts are questioned. In fact,

Judge Hand's opinion in Gregoire v. Biddle reflects this very limitation upon immunity. "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his power," 177 F.2d at 581, quoted in Barr v. Mateo, 360 U.S. at 572, 3 L.Ed. at 1441. The Barr Court went on to remark, "(t)he act sought to be cloaked in immunity must be an appropriate exercise of authority committed by law to the officer." 360 U.S. at 573, 574, 3 L.Ed.2d at 1442, 1443.

Likewise, in Bauer v. Heisel, supra and Palermo v. Rockefeller, supra, the courts recognized that immunity is granted only to acts within the scope of the prosecutor's official function. Bauer v. Heisel, 361 F.2d 581, at 590; Palermo v. Rockefeller, 323 F. Supp. 478, at 485.

The publicizing of an arrest, as done with regard to the appellants herein, is no part of the official duties of the District Attorney. Such acts as engaged in by the appellees are properly condemned by the Code of Professional Responsibility, and the American Bar Association Standards of Justice. (ABA Code of Professional Responsibility Canon 7, Disciplinary Rules, DR-7-107; ABA Standards: Prosecution Function, Part I, §1.3; ABA Standards on Fair Trial

and Free Press, Part I, §1.1, Part II, §2.1(c).

Since the acts complained of here are not committed by law to the authority of the District Attorney, the doctrine of immunity is not applicable. The publicizing of an arrest accompanied by lurid details and characterization of arrested persons as "mobsters" or members of organized crime is a blatant political act designed to garner publicity for the District Attorney. It has become an all-too-frequent occurance in New York City.

The judicial system should not and cannot foster such political activities by cloaking them with an immunity they do not warrant. To do so would encourage law enforcement officials to run for office on the backs of citizens-sacrificing constitutional rights for political advantage.

We are not dealing with the "honest mistake" envisioned by Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579, 581 and quoted in Barr v. Mateo, 360 U.S. at 571, 3 L.Ed.2d at 1441. Here the court is confronted with a conscious and deliberate violation of professional ethics purposefully designed to enhance the political careers of the appellees at the expense of the appellants.

The prosecutor who acts outside the scope of his jurisdiction and without the authorization of law cannot

shelter himself from liability by claiming that he is acting under color of his office. Lewis v. Brautigain, 227 F.2d 124, at 129 (5th C.A., 1955). Nothing in the law of the State of New York authorizes any District Attorney to conduct news conferences in order to disseminate derogatory characterizations of arrested persons. Immunity is not available to shield the movants from responsibility for those acts.

Contrary to the assertion of the lower court, the publicity disseminated by the appellees was far more than an effort "to account through the media to the voting public for his stewardship of his important public trust." A far less "lurid" and "sensational" account of appellants arrest would have sufficed for the purpose. Importantly, the allegations that the appellants have criminal affiliations with well-known underworld figures plays no part in the indictments or the alleged supporting evidence.

It is intellectually dishonest to suggest that a practice which violates the Code of Professional Responsibility is a proper exercise of a prosecutors responsibility to account to the public for his activities.

The law of New York requires that an arrested person be promptly produced before a judge for arraignment. Criminal Procedure Law §210.10 (3). The appellees

here deliberately and maliciously detained the appellants in their offices to guarantee that they could not be arraigned until the following morning, thus insuring the agonizing night spent in a filthy detention pen without food or sleeping facilities.

In Robichand v. Ronan, 351 F.2d. 533 (9th C.A., 1965) two prosecutors were sued, pursuant to 42 U.S.C. §1983 and 1988 for various acts involving the prosecution of a sixteen year old girl. Among other acts the defendant prosecutors were charged with confining the plaintiff in a "drunk tank" with adult prisoners for 25 days without a preliminary hearing and with confining the plaintiff with a male prisoner who had confessed to the murders with which she was charged in order to secure confessions or admissions from the plaintiff.

The Court of Appeals refused to extend the doctrine of immunity to cover the acts complained of:

> The key to the immunity previously held to be protective to the prosecuting attorney is that the acts, alleged to have been wrongful, were committed by the officer in the performance of an integral part of the judicial process. 351 F.2d at 536

and the court succinctly held:

> The title of office, quasi-judicial or even judicial does not of itself immunize the officer from responsibility for unlawful acts which cannot be said to constitute an integral part of judicial process. 351 F.2d at 537, 538 see also Link v. Greyhound Corpor-

ation, 288 F.Supp. 898 (E.D. Mich., 1968).

The court below appears to have misapprehended the allegations of appellants complaint. The appellees were intimately involved in every step of the arrest, detention, and arraignment of the appellants. They were present in court and able to give the judge information which would have confirmed appellants statement regarding their medical condition (As to the arraignment judge's skepticism and Judge Brieant's comment that "Carmine Apuzzo and Angelo Leonardi plead the existence of medical conditions so grevious that it would seem impossible for either of them to have engaged in the sort of criminal activity with which they are charged, it can only be said that since the date of their arrest, Mr. Apuzzo has died of his illness and Mr. Leonardi has had another heart seizure).

The acts complained of here are not decisions committed to the District Attorney's discretion by law. Appellants challenge not the decision to prosecute, but the deliberate, malicious abusive treatment they suffered and the humiliation and loss of essential constitutional rights resulting from the unjustifiable "press conference" conducted by the appellees. The acts complained of are not quasi-judicial. They are base and repugnant to the constitutional process. They

threaten the right of the appellants to a fair trial. They destroy the presumption of innocence. No claim of immunity can justifiably shield the appellees from responsibility for these acts.

Immunity, whether for judges or prosecutors stretches no further than the limits of their official duties. The lurid publicizing of an arrest and the deliberate and malicious violation of law are not official duties of the District Attorney of Bronx County. Messrs. Merola, Darcy and Chesler acted at their peril when they stepped outside their office to commit the acts complained of here.

The refusal of this Court to countenance this suit will promote such malicious and unprofessional activities as engaged in by the appellees. Dismissal serves as a signal that those persons charged with enforcing society's laws are not harnessed to the public good but merely to their own interests and ambitions. Law enforcement officials, no less than any other individual, must obey the law and respect the constitutional rights of all persons. The courts alone can force them to conform their actions to law.

CONCLUSION

The decision of the District Court should be reversed.

DATED: New York, New York
March 26, 1975

Respectfully submitted,

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Andrew P. Zweben

On The Brief

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Preston Anderson, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 980 Simpson St Bronx N.Y.

That on the 4 day of April, 1975, deponent personally served the within Appellant's Brief upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

Hon Mario Merola
District Attorney Bronx County
Attorney for Defendant-Appellee
851 Grand Concourse
Bronx, N.Y.

Preston Anderson

Sworn to before me this
4 day of April, 1975

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1975